In the Supreme Court of the United States,
December Session, 1858. No. 188.

THE SHIP SARAH, SAMPSON AND TAPPAN,
Claimants and Appellants,
vs.
S. AND W. WELSH.
} In Admiralty.

BRIEF OF ARGUMENT FOR THE APPELLEES.

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SAMPSON & TAPPAN, claimants of the ship Sarah, appellants, vs. S. & W. WELSH.	Appeal from Circuit Court of the United States in and for the Eastern District of Penn'a. In Admiralty.

BRIEF OF ARGUMENT FOR APPELLEES.

Two points are presented by this appeal:—

1st. A question of fact, viz: Was the damage caused by any of the excepted perils contained in the bill of lading, or was it due to the unseaworthiness of the vessel?

2d. A question of law. Can the libellants maintain the action?

Upon the first point, both the District and Circuit Courts held that the evidence clearly showed that the damage was occasioned not by stress of weather, but by the unseaworthiness of the vessel.

A brief reference to the evidence we submit, will show that the opinion of the court below on this point is well founded.

The vessel left Boston in May, 1855, and arrived at Whampoa in Nov'r of same year. She was there re-calked. She sailed thence for Rio, where she arrived on 18th March, 1856, after a passage of 84 days. Here she took in the coffee and sailed for Philadelphia, May 18th, having remained in Rio sixty days.

At Rio no calking or overhauling of the vessel was done; but little examination was made before the coffee was loaded. A person went round the vessel in a boat and tried the seams with his

knife, vide testimony of Capt. Albert Drinkwater for the respondents, Record, p. 25. Did not touch the seams with a calking iron. p. 27. On behalf of the libellants, Capt. Silas Pedrick, an experienced witness, says, Record, p. 15: That in such a warm climate one re-calking at Whampoa, in a vessel seven months out, would not be sufficient; that sailing round the vessel in a boat, and trying the seams with a knife, would not be a proper or prudent examination; that an examination by a calking iron is the only way to ascertain the condition of the seams, and that in deciding whether this vessel was fit to take a cargo of coffee to Philadelphia, it would have been common prudence to have tried her in that way. Vide p. 17, Record.

That the vessel in question rated as an A 2 ship, and not fit for the coffee trade (Record, p. 16), and should undoubtedly have been re-calked at Rio. Vide answer to respondents' cross-examination, p. 15.

The character of the damage shows that it was occasioned *by the opening of the deck seams.* The vessel had two decks, and the bags of coffee were piled in tiers. Capt. Pedrick, who made the survey of the cargo, says, Record, p. 13: The bulk of the damage was the tier of bags next below the upper deck, the upper tier of bags, then the ground tier of bags on the lower deck. "Most of the damage was about the hatches, where the water had gone round the combings of the hatches. The seams around the combings of the hatches seemed more open than any other part of the ship, and extended further into the cargo; the seams of the main combings of the upper deck, and the combings of the hatch of the lower deck, were particularly open around the hatch. That is the foundation of the damage." And on p. 14—Damage in the centre of the ship was not much, but "every seam showed where the water came down. I saw where the water had run down around the combings of the main hatch." And again, p. 14—"There was very little damage from 'blowing.' This damage would be in the bilges—it would not go much above the bilges in blowing; you could see where it trickled down through the seams."

Charles Bentrick, another witness for libellants, Record, p. 18, speaks of the bags being wet "right under the seam."

Louis C. Madeira says, Record, p. 22, that the ends of the bags in the whole tier were stained and damaged; that "the four corners of the bags, as they approached each other in the tier, was

damaged all the way down, as far as I could see, nearly to the deck." This was under the after part of the main hatch, on the larboard side. p. 22.

This testimony, and that of other witnesses on the record, establish, as we contend, that the damage resulted from the imperfect condition of the deck seams. Was this occasioned by stress of weather? Did the vessel encounter any perils which could have so affected a seaworthy ship? The answer to this is given by the log, an abstract of which is on p. 33 of the Record. It shows they had fine weather except for portions of three days, July 11th, 12th and 13th. The weather of the 11th was "moderate" until 10 P.M., when the worst the vessel encountered was "strong breezes and heavy squalls." The 12th we have "strong breezes and thick, rainy weather," which ends in nothing worse than "heavy squalls and rainy weather." The 13th commences with "strong breezes and heavy squalls," and so until 4 P. M., then "increasing winds," when they "furled the foresail and close reefed the main-topsail;" at 8 P.M. there was nothing worse than "strong, heavy gales and very squally—a high sea running," and at morning the weather was moderate again.

To this evidence we apply the observation of Capt. Pedrick, Record, p. 14: "The water way seams will be apt to leak in a gale of wind; *but we don't consider that the body of either deck is going to strain in a seaworthy vessel.* I have been to sea for years, and have made East India voyages."

Douglas *v.* Scougal, 4 Dow., 269.

Ship sails and soon after encounters a storm, becomes leaky and puts back, and is found on survey damage is discovered which could not be fairly considered as the effect of the storm. Held by the House of Lords that the ship was not seaworthy when she sailed.

Parker *v.* Potts, 3 Dow., 23.

A ship is prima facie to be deemed seaworthy. But if it is found soon after sailing that she is not so sound without adequate cause by stress of weather or otherwise to account for it, the rational inference is that, notwithstanding appearances, she was not seaworthy. See also Watson *v.* Clark, 1 Dow., 336.

It is objected that the libellants in the same action claimed to recover for damages to cargo, and for disbursements on account of the vessel. No case is cited to show that such claims may not be

joined. Pratt *vs.* Thomas, cited from Ware's Rep. 427, has no bearing on the question. That was a case of a claim for *wages* joined with a claim in personam for an assault and battery.

In the present case the cause of action in both aspects was based on *contract*. As consignees of cargo on which they had made heavy advances, they had a recourse to the ship resulting from the contract of affreightment, as well on behalf of their consignors as on their own account. Their contract to make advances, and its performance, entitled them also to hold the vessel responsible. Why incur unnecessary costs by filing separate libels? If that had been done, we submit, the respondents would have had a right to have the actions consolidated under the act of July 22, 1813, ch. 14, sec. 3, 3 Stat. at Large, p. 19, authorizing the court to consolidate "causes of the like nature."

In allowing the exception to the libel in Pratt *vs.* Thomas, Judge Ware admitted that it was a common practice in the admiralty to proceed in the same libel for wages earned in a particular voyage, and for damages for a tortious discharge of the seaman in the course of the same voyage, and that although the extent to which different actions may be united in a single suit in the admiralty is not very clearly defined, yet the practice of the common law in allowing several independent causes of action to be joined, provided they are of the same nature, might well be adopted in the admiralty, provided it did not lead to delay or oppression; and he intimates that where no motion is made to strike one or more of the actions out of the libel, the court might adjudicate on all, making separate decrees in respect to each. And in Conkling's Admr. Prac. p. 377, after a review of the matter, the learned author says: "Upon the whole, it may not be very unsafe to affirm that the libellant has the privilege of uniting in one suit as many actions of a like nature as he pleases, subject to the discretionary power of the court to order one or more of several actions so joined to be stricken from the libel when this privilege appears to have been oppressively or very unreasonably used."

No such motion was made in the present case, nor is any oppression apparent, for the District Court rejected the claim for disbursement on the ground that the libellants had lost it by parting with the possession of the vessel. And the respondents have, in fact, practically settled the matter of the disbursements by electing to set off the freight (deducting the disbursements) against the amount

of the decree in accordance with the permission given in the opinion of the court below.

As to this matter of set-off we have only to say, in answer to the other side, that no compulsory decree was made about it. Leave was given to respondent by the court below to reduce the amount of damage by deducting the freight, less the advances. They elected to do so, and a decree was entered for the balance, $1,071 27.

Had they declined doing so, the decree would have been for $2,822 35, leaving the matter of the freight to be settled by a common law action, in which the libellants would have a right to set off the advancement or any other charges they may have had against the respondents. The course adopted by the parties was a mere settlement of accounts so far as disbursements and freight was concerned.

2. The principal point raised by the argument of the other side is, that being consignees of the vessel, the libellants stand in such a fiduciary relation to her that they cannot prosecute the claim of the cargo against her.

If any such principle could be found in the law (and no case is cited for it) we submit that the respondents would be estopped from taking advantage of it. In chartering the vessel at Rio, the agents of the vessel there expressly agreed that she should be consigned to the identical parties to whom the cargo should be sent. The charter party executed at Rio, see Record, p. 42, stipulates "*the vessel to be consigned to the charterers' agents at the port of discharge.*" And this stipulation was in accordance and pursuance of the general custom of merchants. It is a distinct averment of the libel uncontradicted by answer or evidence that it is the general custom of merchants in the port of Rio, where this ship came from, and is a general custom throughout the mercantile world, so far as libellants are aware, in chartering an entire vessel, to bargain for and if possible to make the agents of the charterers, or consignee of the cargo, the inward consignee of the vessel at the port of delivery.

Having voluntarily sent their vessel to the consignees of the cargo, can they be permitted to say that the principle of the commercial law, by which ship is bound to cargo and responsible for its safe carriage, shall be abrogated in case of their breach of contract, and that in all such cases the owners of cargo have no remedy against the vessel?

But the principle relied on by respondents has no application to

this case; the fact being that, before the process issued, the libellants had *parted with the possession of the vessel.* They had handed her over to the custody of the owners' agents at Philadelphia. When the attachment was served, that agent intervened and made claim as follows, Record, p. 7:—

"And now Albert Drinkwater, intervening for the interest of Sampson & Tappan, appears, etc., and makes claim to the said ship, etc.; and the said Albert avers that he *was in possession of the said ship at the time of the attachment thereof*, and that the persons above named are the true and bona fide owners of said ship, etc., and the said Albert is master of the said ship, *and the true and lawful bailee thereof for the said owners*, wherefore he prays to be admitted to defend."

And it is to be observed that the respondents succeeded in defeating the lien claimed for the disbursements on the ground that the consignees had *parted with the possession* of the vessel.

In delivering the opinion of the court below, Mr. Justice Grier observes—

"As consignees of the vessel, the libellants have discharged their duty to her. She is no longer in their possession, but is under the orders and in the possession of the owners or their agent. They (the consignees) have paid the charges, received the freight, and discharged the vessel, and their duty as consignees of cargo now requires this reclamation to be made."

The point raised by the appellants, therefore, so far as concerns the present case, is a mere abstraction which it is needless to discuss.

FALLON & SERRILL,
For Appellees.